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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MUSTANG TRANSPORTATION COMPANY, HENRY CROWDER, AND CANAL INSURANCE COMPANY,
Petitioners,

v.

RYDER TRUCK LINES, INC., AND LIBERTY MUTUAL INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October 27, 1982

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QUESTION PRESENTED

Whether regulations of the Interstate Commerce Commission impose liability upon a vehicle lessee as a matter of law while the vehicle is being used in furtherance of the lessee's business?

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MUSTANG TRANSPORTATION COMPANY, HENRY CROWDER, AND CANAL INSURANCE COMPANY,
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v.

RYDER TRUCK LINES, INC., AND LIBERTY MUTUAL INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Mustang Transportation Company, Henry Crowder and Canal Insurance Company [1] respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 29, 1982.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania in *Mustang Transportation Company v. Ryder Truck Lines, Inc.* (App. 2a-19a), is reported at 523 F. Supp. 1097 (E.D. Pa. 1981). The decision of the district court was affirmed without opinion by the United States Court of Appeals for the Third Circuit on July 29, 1982. (App. 20a-21a).

[1] Neither of the corporate Petitioners is related to a company whose listing is required by Rule 28.1 of the Rules of the Supreme Court of the United States.

JURISDICTION

This Petition for Writ of Certiorari is being filed within the prescribed 90-day period following July 29, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

REGULATION INVOLVED

The Interstate Commerce Commission (ICC) regulation at issue, 49 C.F.R. § 1057.4(a)(4), has been revised and codified in 49 C.F.R. § 1057.12(d). Both are reproduced in the apendix to this petition. (App. 22a).

STATEMENT OF THE CASE

This action concerns a dispute over the ultimate liability for damages claimed by certain individuals involved in a motor vehicle accident in December of 1969. The accident resulted in the death of one Edward A. Renzi (Renzi) and in injuries to his companions Charles A. Benedict (Benedict) and Daniel Mattia (Mattia). Two personal injury actions ensued. Marie A. Renzi, Executrix for the estate of her deceased husband, brought her action against Henry Crowder (Crowder), the owner and driver of the truck which collided with the Renzi vehicle; Mustang Transportation Company (Mustang), the owner of the trailer attached to Crowder's truck; and, R. L. Dease, Mustang's majority shareholder. Those defendants filed a third-party claim against Ryder Truck Lines, Inc. (Ryder) to which Crowder had leased the vehicle on the day prior to the accident date. The second action, instituted by Benedict and Mattia, named only Crowder and Dease as defendants, and neither defendant filed a third party claim.

The two suits were eventually consolidated, and both were then settled for a total of $117,500.00. Canal Insurance Company (Canal), which had issued a policy providing insurance coverage to Mustang, and Liberty Mu-

tual Insurance Company (Liberty Mutual), which had issued a policy providing insurance coverage to Ryder, each paid one half of the settlement amount. As part of the settlement, it was agreed that another action would be instituted in the United States District Court for the Eastern District of Pennsylvania, in which Canal and Liberty Mutual would join, in order that Mustang's and Ryder's liability for the damages incurred as well as questions concerning the insurance coverage available to them and to Crowder could be resolved simultaneously. That agreement resulted in this litigation, with Crowder, Dease, Mustang and Canal as plaintiffs and Ryder and Liberty Mutual as defendants and plaintiffs on the counterclaim. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332(a)(1) (1976) on the basis of the diversity of citizenship of the parties. It was stipulated by the parties that for the purposes of this action Crowder's operation of the vehicle would be presumed negligent and the proximate cause of the injuries sustained by the accident victims.

Crowder's relationship with Mustang was set forth in a long-term lease agreement. According to the terms of that agreement, Crowder or someone in his employ would drive his truck to haul freight for Mustang, the proceeds to be divided between them on a percentage basis. In early December of 1968, having just completed a trip for Mustang for its base of operations in Georgia, Crowder found himself in New Jersey with no freight for a return run. At the suggestion of a third party, Crowder contacted and entered into a second lease agreement with Ryder.

That agreement identified Mustang as the vehicle lessor, and called for Crowder to haul certain regulated commodities from New York to Michigan. As Mustang was not authorized to transport regulated commodities over the scheduled route, Ryder provided the ICC certificate under which Crowder operated. The trip lease also

stated that in accordance with ICC regulations[2] Ryder maintained exclusive possession and control over the vehicle and assumed full responsibility for its operation.

The case was submitted to the district court sitting without a jury on the basis of stipulated facts and the deposition testimony of Mr. Dease. Disregarding the responsibility imposed upon Ryder by the ICC's regulations and assumed by Ryder under the lease, and ignoring the fact that Crowder was hauling freight for Ryder under the authority of an ICC certificate held by Ryder, the district court found Crowder to have been acting solely in the employ of Mustang at the time of the accident. Consequently, the court found Mustang alone vicariously liable for Crowder's acts of negligence. The court also ruled that neither Crowder nor Mustang was entitled to coverage under the Liberty Mutual policy. Since Canal had conceded that Mustang qualified for coverage under its policy, the court entered judgment in favor of Ryder and Liberty Mutual as defendants and as plaintiffs on the counterclaim against Crowder, Mustang and Canal for the full amount at issue.

Mustang, Crowder and Canal sought review of the district court's decision in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1291 (1976). On July 29, 1982, the Third Circuit entered an order affirming, without opinion, the district court's judgment.

REASONS FOR GRANTING A WRIT

The opinion of the district court, as affirmed by the United States Court of Appeals for the Third Circuit, presents this Court with a clear example of a case worthy of certiorari. It involves a federal question of significance—the effect of ICC regulations designed to cure certain ills besetting the nation's trucking indus-

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[2] 49 C.F.R. § 1057.4(a)(4) (1969) (App. 22a).

try—and represents a departure from the decisions rendered by every court, including other Courts of Appeals, which had previously ruled upon the question.

There can be little doubt as to the importance of the regulatory scheme involved. Three times in the last four years the transportation industry has been the subject of Congressional review and action, and trucks form a vital part of the freight hauling system. 49 U.S.C. § 10101, *et seq.* (Supp. IV 1980). The House Public Works and Transportation Committee noted that "regulated motor carriers handled about one billion tons of freight in intercity service in 1979 and logged over 21.5 billion intercity miles," and though the "regulated truckers owned approximately 950,000 pieces of equipment," they comprised less than fifty percent of the industry. H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2284.

Congress intended the Motor Carrier Act of 1980 to result in an increase in those numbers by its reduction of unnecessary federal regulation and provision for greater ease of entry into the interstate trucking business. Motor Carrier Act of 1980 §§ 2, 3(a), 1980 U.S. Code Cong. & Ad. News (94 Stat.) 793. At the same time, Congress was well aware that relaxation of previously existing restrictions could "open the highways to truckers who might have little concern for the safe operation and maintenance of their vehicles, thereby posing a threat to those who share the highways with them." H.R. Rep. No. 96-1069 at 6, U.S. Code Cong. & Ad. News at 2288. This problem of highway safety and carrier responsibility was considered of great significance, and, in order to address it, a security insurance coverage requirement was retained in the Act. 49 U.S.C. § 10927 (a)(1) (Supp. IV 1980).

Thus, highway safety remains an important governmental interest, as it was at the time the predecessor

regulations to those at issue in this case were first promulgated. In upholding the authority of the ICC to promulgate those predecessor regulations, this Court, in *American Trucking Associations, Inc. v. United States*, 344 U.S. 298 (1953), noted the kinds of abuses which the regulations sought to remedy. Among them were the fact that authorized carriers routinely engaged in the use of non-owned equipment through leasing arrangements and that the Commission's safety requirements were not always observed with respect to leased equipment. 344 U.S. at 303-4. The Court in *American Trucking Associations* also noted that contractual relationships between the certified carriers and exempt lessors were often informal. Oral leases were found to be commonplace, giving rise to difficulties in placing responsibility for accidents upon the authorized carrier.

In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975), this Court again recognized the problem which the ICC sought to address in 49 C.F.R. 1057.4:

> It is apparent, therefore, that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the public, were the significant aims and guideposts in the development of the comprehensive rules.

423 U.S. at 37. The Court noted the propriety of the ICC's solution to this problem, stating that "the requirement that the lessee assume control and responsibility tends to assure that a party directly responsible to the Commission is in actual charge of the operation." 423 U.S. at 38.

With this policy in mind, the lower courts have, until the decision by the district court in this case, held without

exception that the effect of 49 C.F.R. § 1057.4(a)(4) is to impose liability upon a vehicle lessee as a matter of law while the vehicle is being used in furtherance of his business. Thus, the United States District Court for the District of Delaware ruled in *Cosmopolitan Mutual Insurance Company v. White*, 336 F. Supp. 92, 99 (D.Del. 1972), that "the ICC carrier's liability for equipment and drivers covered by leasing arrangements is not governed by the traditional common law doctrines of master-servant relationships and respondeat superior." One year later the United States Court of Appeals for the Fifth Circuit noted its agreement with that conclusion, and explained further:

> The deliberate fulfillment of these statutory prerequisites by the parties must be viewed as giving rise to a statutory relationship, since these regulations have the force and effect of law, *Cox v. Bond*, [53 N.J. 186, 249 A.2d 579, 586 (1969)]. Since under the lease Dubose [the lessee] assumed exclusive possession, control and use of the vehicle and responsibility to the public then King [the driver] became his statutory employee, and as such Dubose was vicariously liable as a matter of law for the negligence of King.

Simmons v. King, 478 F.2d 857, 867 (5th Cir. 1973). *Simmons* was followed by *Transamerican Freight Lines, Inc.*, in which this Court also discussed the relationship of the lessor and lessee to the vehicle driver:

> It is to be acknowledged, to be sure, that the lessor's furnishing of a driver allows an aspect of control, in a sense, to remain in the lessor. But this is ministerial control, not control of a kind with which the Commission was concerned in *Ex Parte No. MC-43*. Its concern, as we have noted, was with operating authority, with routes and destinations and classes of freight, with the integrity of certifi-

> cations, and with that ultimate control in the lessee that makes and keeps it responsible to the public, the shipper, and the Commission.

423 U.S. at 39. It is clear, therefore, that until the district court's decision in this case, the federal courts had consistently held that the ICC regulations have the force of law, that they place full responsibility for the negligent operation of a vehicle upon the lessee, and that the policy behind them is effectuated by deeming the vehicle operator to be the employee of the lessee as a matter of law.[3]

Decisions of the state courts which have addressed this question are in accord. Most recently, the Georgia Supreme Court faced a nearly identical factual setting in *Farmer v. Ryder Truck Lines, Inc.*, 245 Ga. 734, 266 S.E. 2d 922, *cert. denied*, 449 U.S. 885 (1980). That court held the ICC regulations rendered the vehicle operator the employee solely of the lessee for workmen's compensation purposes. The Supreme Judicial Court of Maine, relying on *Cosmopolitan Mutual Insurance* and *Simmons*, has also expressed agreement with the view that liability was imposed by operation of the ICC regulations, and was not premised upon master-servant or employer-employee relationships. *Weeks v. Kelley*, 377 A.2d 444 (Me. 1977). The Illinois Supreme Court carried the point one step further in *Schedler v. Rowley Interstate Transportation Co., Inc.*, 68 Ill. 2d 7, 368 N.E. 2d 1287 (1977), by imposing liability as a matter of law even though the vehicle was not being operated in the furtherance of the lessee's business, a position not being advocated here.

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[3] The United States Court of Appeals for the Seventh Circuit expressed similar views in *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972), a case which involved the effect of the ICC's regulations on an indemnity provision in the contract between the lessor and lessee. Such provisions, however, are not at issue here.

The district court's justification for ignoring this authority was based upon the false assumption that "Ryder's responsibility to the public or to any shipper is not at issue in this case."[4] (App. 11a). It appears that the court was confused by the presence of the two insurance companies as parties to the litigation. But once the district court determined that the vehicle operator was not an insured individual under the terms of either policy, it had to decide the question of the trucker's ultimate responsibility to the public. Having erroneously found the federal case law to be inapplicable, the district court applied state law, in this case that of Georgia, according to which it ruled that the lessor was the operator's sole employer.[5] The case turned on that finding since, as Liberty Mutual conceded on appeal, the vehicle operator would have been an insured individual under its policy if he were found to be the lessee's employee. (Brief for Appellees at 20).

If allowed to stand, the Court of Appeal's affirmance of the district court's decision in this case will have the

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[4] This phrase had its origin in *Carolina Casualty Insurance Company v. Insurance Company of North America*, 595 F.2d 128 (3d Cir. 1979), a case in which the responsibility for the acts of a negligent driver was not at issue. In that case, a jury had determined that both the lessor and the lessee of the vehicle were responsible for the accident which was caused by poorly maintained equipment. The only question faced by the Court of Appeals in *Carolina Casualty* was which of the two insurance carriers provided coverage under these circumstances.

[5] It should be noted that the district court also erred in its interpretation of Georgia law. The Court based its decision on *Six Flags Over Georgia, Inc. v. Hill*, 247 Ga. 375, 276 S.E. 2d 572 (1981) a case which involved a construction site accident, choosing to ignore the same Court's determination of employment in *Farmer v. Ryder Truck Lines, Inc.*, a truck leasing arrangement almost identical to that presented here.

effect of severely disrupting the regulatory scheme established by the ICC and upheld by this Court in its prior decisions. The approach taken by the district court ignores the uniform allocation of responsibility established by the ICC's rules. Since the leasing arrangement at issue in this case is a common one, the result of the district court's opinion could well be an emasculation of the requirement that the lessee assume full responsibility for its vehicles to the public. The very ill that the ICC's regulations were designed to cure would again exist, with carriers hiding behind the employment status of the vehicle operators to avoid carrying out their responsibility to provide well maintained, safely operated equipment.

In affirming the opinion of the district court, the Court of Appeals for the Third Circuit has not only ignored the obvious implication of this Court's decision in *Transamerican Freight Lines, Inc.* and placed itself in conflict with the Court of Appeals for the Fifth Circuit and the Seventh Circuit as well as the courts of last resort of the states of Georgia, Illinois, and Maine, but also may have set the regulation of the nation's trucking industry back nearly twenty years.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Company, Henry Crowder,
and Canal Insurance
Company

October 27, 1982

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1620

MUSTANG TRANSPORTATION COMPANY, *et al.*

vs.

RYDER TRUCK LINES, INC., *et al.*

JUDGMENT

AND NOW, this 28th day of September, 1981, the following is ORDERED and ADJUDGED:

1. Judgment is entered on plaintiffs' complaint in favor of defendants Ryder Truck Lines, Inc. and Liberty Mutual Insurance Company and against plaintiffs Mustang Transportation Company, R.L. Dease, Henry Crowder and Canal Insurance Company.

2. Judgment in the amount of Fifty Eight Thousand Seven Hundred Fifty ($58,750.00) Dollars, together with costs, is entered in favor of defendants Ryder Truck Lines, Inc. and Liberty Mutual Insurance Company and against plaintiffs Mustang Transportation Company, Henry Crowder and Canal Insurance Company. As to plaintiff R.L. Dease, judgment on the counterclaim is entered in his favor and against defendants Ryder Truck Lines, Inc. and Liberty Mutual Insurance Company.

BY THE COURT:

/s/ Clifford Scott Green
CLIFFORD SCOTT GREEN
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 77-1620

MUSTANG TRANSPORTATION COMPANY, *et al.*

vs.

RYDER TRUCK LINES, INC., *et al.*

MEMORANDUM

Filed September 28th, 1981

GREEN, J.

This lawsuit arose out of a collision between an automobile and a tractor-trailer, which occurred on December 7, 1969 on U.S. Route 22 in Juniata County, Pennsylvania. Edward Renzi, a passenger in the car, died as a result of injuries suffered in the accident while Charles Benedict and Daniel Mattia, the driver of the car and another passenger, were injured. The estate of Mr. Renzi instituted an action against Henry Crowder, the driver of the tractor-trailer and the owner of the tractor portion; Mustang Transportation Company ("Mustang"), owner of the trailer portion; and R.L. Dease, Vice-President and Secretary of Mustang. Ryder Truck Lines ("Ryder"), which had hired the Crowder/Mustang tractor-trailer to deliver a load from New York to Michigan, was added to the initial lawsuit as a third-party defendant. Messrs. Benedict and Mattia brought another action against Henry Crowder and R.L. Dease. Subsequently, the two cases were consolidated and eventually were settled for $117,500.00 pursuant to a court-approved stipulation.

Under the terms of that stipulation, Ryder and its insurer, Liberty Mutual Insurance Company ("Liberty")

agreed to pay one half of the settlement amount, and Mustang, its insurer, Canal Insurance Company ("Canal") and R.L. Dease agreed to pay the other half. However, the parties stipulated that these payments did not constitute admissions of liability or of proportionate responsibility. Pursuant to the agreement, the issues of liability and insurance coverage were to be determined by a court in another suit. Plaintiffs Crowder, Mustang, Canal and Dease brought this diversity action in order to resolve these questions, and defendants Ryder and Liberty have counterclaimed. The matter has been submitted to me for trial without a jury. This memorandum constitutes findings of facts and conclusions of law as required by Fed. R. Civ. P. 52(a).

I.

For purposes of determining the issues of liability and insurance coverage, the parties have stipulated to the following facts. The acts and omissions of plaintiff Henry Crowder were the proximate cause of the injuries and damages suffered by Renzi, Benedict and Mattia. At the time of the accident, Mr. Crowder was transporting a load from New York to Michigan pursuant to a one-way lease agreement with Ryder. (Exhibit A, Amended Complaint) This lease agreement identifies "Mustang Transportation-Henry Crowder" as the lessors and is signed by Crowder on their behalf. The goods in this haul were commodities regulated by the Interstate Commerce Commission ("ICC"); Mustang did not have an ICC permit to haul regulated commodities in either Pennsylvania or New Jersey. The truck driven by Crowder consisted of a tractor portion owned by him and a trailer portion owned by Mustang. He was operating the truck under a lease agreement between Mustang and him, which was in effect at the time of the accident. In the trip preceding the one during which the accident occurred, Crowder had transported on behalf of Mustang

goods from Georgia to New Jersey. On the instructions of R.L. Dease, Vice-President of Mustang and another plaintiff in this case, Crowder sought a load for the return trip to Georgia from the Lester Newton Trucking Company. It did not have a load but directed Crowder to Ryder, which did have one. Without speaking to anyone at Mustang, Crowder entered into, on behalf of Mustang and himself, the one-way lease agreement with Ryder described previously. On prior occasions, Crowder and others driving vehicles owned or leased by Mustang had entered into contracts with third parties for hauling goods without first obtaining the permission of Mustang. Also, in the past, when Dease was unable to find return loads for Crowder and other drivers of vehicles owned or leased by Mustang, he hold them that they could try to find other loads to haul on behalf of Mustang. Mustang did not learn of the lease agreement with Ryder signed by Crowder until December 8, 1969, the day after the accident. Ryder paid Mustang for the use of the tractor-trailer in accordance with the agreement; in turn, Mustang paid Crowder pursuant to the terms of the lease between them.

II.

The first issue to be resolved is the nature of the relationship of Henry Crowder to Mustang and to Ryder at the time of the accident. Disclaiming liability for the acts of Crowder, Mustang and Ryder each denies that he was its agent or employee (servant)[1] at the time of the accident. In fact, each contends that the other was his principal or employer (master).

The Restatement (Second) of Agency defines agency as:

> . . . the fiduciary relation which results from the manifestation of consent by one person to another

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[1] Master and servant are common law terms for employer and employee. Comment d to § 2 of the Restatement (Second) of Agency.

> that the other shall act on his behalf and subject to his control, and consent by the other so to act. RESTATEMENT (SECOND) OF AGENCY, § 1 (1957).

The one for whom action is to be taken is the principal, and the one who is to act is the agent. *Id.* The Restatement characterizes a servant as "a species of agent" (Comment a to § 2) and defines it as:

> . . . an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master. *Id.*, § 2

An agent who is not a servant is an "independent contractor." An independent contractor is one who "contracts to act on account of the principal." (Comment b to § 2 of the Restatement (Second)). The distinction between the relationship of master/servant and that of principal/independent contractor, according to the Restatement, is that in the former situation, the master is responsible to third persons for the physical conduct of his servant. *Id.* Since this case requires a determination of liability for the physical conduct of Crowder at the time of the accident, I must decide whether, as to Mustang and to Ryder, Crowder acted as a servant or as an independent contractor.[2] I begin with an analysis of the relationship between Crowder and Mustang.

As noted earlier, at the time of the accident, the relationship between Mustang and Crowder was defined by a lease agreement. Under Georgia law,[3] one's status as

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[2] Under Georgia law (see discussion in note 3 *infra* for why this law applies), the general rule is that an employer is not liable for the negligent acts of an independent contractor employed by him. NEDA Constr. Co. v. Jenkins, 137 Ga. App. 344, 223 S.E.2d 732 (1976).

[3] In a diversity action, the federal court must look to the choice of law rules of the forum state to ascertain what law applies. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, (1941). The relation-

servant or independent contractor turns on whether the employer has the power to control the manner in which the work is executed or whether he merely has the right to require certain results. *Fidelity & Casualty Co. v. Windham*, 209 Ga. 592, 74 S.E.2d 835, 837 (1953). The Georgia Court of Appeals has stated the following test:

> If the employer has or assumes the right to control how the work shall be done, as distinguished from the mere right to require certain definite results in conformity to the contract, the relation is that of employer and servant rather than that of employer and independent contractor. *Employers Mutual Liability Insurance Co. v. Johnson*, 104 Ga. App. 617, 122 S.E.2d 308, 309 (1961)

Paragraph 9 of the lease agreement describes Crowder as an independent contractor. If a written contract describes a party as an independent contractor, it is presumed that he is as designated. *Family Life Assurance Co. v. Welch*, 120 Ga. App. 334, 170 S.E.2d 703, 707 (1969). However, if other provisions of the agreement reveal that the employer has retained control over the time, manner and method of execution of the work, this presumption will not apply. *A.L. Williams & Associates v. Sun Life Assurance Co.*, 153 Ga. App. 371, 265 S.E.2d 285 (1980).

An examination of the lease agreement, which was drafted by Mustang, reveals that despite the description

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ship between Mustang and Crowder is defined primarily by a contract of employment, a lease agreement. Under Pennsylvania choice of law rules, in a contract action the method for determining the applicable law combines "grouping of contacts," as prescribed in the Restatement (Second) of Conflicts of Law, and an "interest analysis." Melville v. American Home Assurance Co., 584 F.2d 1306, 1311 (3d Cir. 1978). Using this approach, it appears that Georgia law would apply since the lease agreement was executed in Georgia between a Georgia corporation and a Georgia resident.

of Crowder as an independent contractor, Mustang maintained sufficient control over the execution of Crowder's work to establish a relationship of master and servant. For example, paragraph 10 of the agreement states: "The owner [Crowder] agrees that said vehicle(s) shall be operated in accordance with all rules, policies and practices of Mustang." Paragraph 2 provides in relevant part: "Any driver (including the owner if he shall drive himself) shall comply with all safety regulations of Mustang, the Interstate Commerce Commission and the United States Department of Transportation, at all times." Similarly, Paragraph 5 states:

> Owner [Crowder] hereby agrees that no freight will be transported on said vehicle(s) while being used in the transportation of freight other than at the direction of Mustang, or with the knowledge and consent of Mustang, and that all freight transported thereon or therein will be transported pursuant to freight bills and bills of lading made out by or for and in the name of Mustang, and that otherwise the owner waives any right under this contract, including payment for transportation.

While Mustang may have wished to limit its liability by describing Crowder as an independent contractor, these provisions show that it maintained too much control over the manner in which Crowder operated the tractor-trailer and transported freight to create a relationship of principal and independent contractor.

Mustang denies that it was the employer or principal of Henry Crowder when the accident occurred because at the time he was transporting a load for Ryder. The parties have stipulated that a lease agreement existed between Crowder and Mustang at the time of the accident. Further, they have stipulated that although Crowder entered into the one-way lease agreement with Ryder without the express knowledge and permission of Mus-

tang, in the past in similar situations Mustang has told Crowder to find return loads to haul on its behalf. Moreover, it is agreed that Mustang accepted payment from Ryder for the use of the tractor-trailer as provided in the one-way lease, and, in turn, Mustang paid Crowder for the trip in accordance with the terms of the lease between them. Therefore, even if the prior custom of Mustang did not confer authority on Crowder to enter into the agreement with Ryder on behalf of Mustang, and I believe it did, Mustang's acceptance of the benefits of that agreement constituted a ratification of Crowder's agency. *See Advance Mortgage Corp. v. Guaranty Title Insurance Co.*, 416 F.2d 451 (5th Cir. 1969); *Causey v. Gulf Life Insurance Co.*, 62 Ga. App. 378, 8 S.E.2d 535 (1940).

Having determined that Crowder was the servant of Mustang, I now must decide Crowder's relationship to Ryder. At the time of the accident, Crowder was transporting goods from New York to Michigan for Ryder pursuant to a one-way lease agreement. The question is whether under the terms of that agreement Crowder was acting as a borrowed servant or as an independent contractor. Under Georgia law,[4] in order to qualify as a borrowed servant (employee), the evidence must show that "(1) the special master had complete control and direction of the servant for the occasion; (2) the gen-

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[4] In ascertaining the nature of the relationship between Crowder and Ryder, Georgia law would appear to govern. Both Crowder and Mustang are citizens of Georgia. Crowder's authority to enter into an agreement with Ryder was created in Georgia, and ultimately Mustang ratified the agreement there.

Without explaining why, defendants urge that either Florida or Massachusetts law should control. However, the only connection I can discern between this case and Florida is that Ryder is a citizen of that state. Similarly, the only connection with Massachusetts is that Liberty Mutual is a citizen. These contacts are not sufficient under the standard set forth in Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978).

eral master had no such control, and (3) the special master had the exclusive right to discharge the servant." *Six Flags Over Georgia, Inc. v. Hill*, —— Ga. ——, 276 S.E.2d 572, 574 (1981) (quoting *United States Fidelity & Guaranty Co. v. Forrester*, 230 Ga. 182, 196 S.E.2d 133 (1973).

The lease agreement entered into by Crowder on behalf of Mustang and himself with Ryder describes Crowder and Mustang as the lessor and Ryder as the lessee. Its provisions do not vest in Ryder complete control and direction of Crowder while he was transporting goods for Ryder. In fact, the agreement does not give Ryder any control over the manner in which Crowder was to operate the truck. It expressly limits Ryder's control to the leased vehicle:

> The leased equipment under this agreement is in the exclusive possession, control and use of the authorized carrier Lessee [Ryder] and that the Lessee [Ryder] assumes full responsibility in respect to the equipment it is operating to the public, the shippers and the INTERSTATE COMMERCE COMMISSION.

Turning to the second part of the test for borrowed servants stated in *Six Flags, supra*, there is nothing in the lease agreements between Ryder and Crowder (and Mustang) which divested Mustang of any control it had over Crowder. As to the third element of the *Six Flags* test, the one-way lease agreement provides:

> In the event that equipment referred to herein is not in proper mechanical condition or for any other reason is deemed inadequate to the Lessee [Ryder], then the Lessee [Ryder] shall have the authority to transfer any shipment from this equipment and handle same according to the best judgment of the Lessee [Ryder].

This language focuses on Ryder's control over the shipment and not over the driver. Therefore, applying the three-part test for a borrowed servant set forth in the *Six Flags* case, Crowder does not qualify as a borrowed servant of Ryder under Georgia law. Because Ryder merely had the ". . . right to require certain definite results in conformity with the contract. . .", *Employers Mutual Liability Insurance Co. v. Johnson*, 104 Ga. App. 617, 122 S.E.2d 308, 309 (1961), at the time of the accident Crower's relationship with Ryder was that of independent contractor and principal under Georgia law. Thus no basis for liability of Ryder for the negligence of Crowder arises under state tort law.

However, citing *Simmons v. King*, 478 F.2d 857 (5th Cir. 1973), Mustang argues that pursuant to ICC regulation 49 C.F.R. § 1057.4 Ryder, as lessee of the truck, was the statutory employer of Crowder and therefore was liable for his negligence as a matter of law. 49 C.F.R. § 1057.4(a)(4) requires that a carrier which leases a motor vehicle not owned by it undertake in the lease "exclusive possession, control and use of the equipment" and assume complete "responsibility in respect thereto."

While courts, including the Fifth Circuit in *Simmons, supra*, have held that § 1057.4 imposes liability on the lessee of a motor vehicle for harm done to a member of the public or to a shipper as a result of the operation of the leased vehicle, they have not found that the regulation imposes exclusive liability on the lessee and its insurer. In a case involving in part the question of liability under § 1057.4, the Third Circuit observed:

> While a lessee cannot free itself of its federally imposed duties when protection of the public is at stake, the federal requirements are not so radically intrusive as to absolve lessors or their insurers of otherwise existing obligations under applicable state tort law doctrines or under contracts allocating financial

risk among private parties. *Carolina Casualty Insurance Co. v. Insurance Company of North America*, 595 F.2d 128, 138 (3d Cir. 1979).

49 C.F.R. § 1057.4(a)(4) required that Ryder, as lessee, assume exclusive possession, control and use of the tractor-trailer as well as full responsibility for its operation, and under a provision of the one-way lease agreement, Ryder did just that.[5] Under the principles stated in *Simmons, supra* and other decisions, Ryder would be liable to members of the public and to shippers who were damaged by the negligence of Crowder in the operation of the truck during that trip. That is, if a member of one of those groups (the public or shippers) were seeking to recover for harm caused by the negligence of Crowder, Ryder would be vicariously liable as the statutory employer of Crowder pursaunt to 49 C.F.R. § 1057.4(a)(4). However, Ryder's responsibility to the public or to any shipper is not at issue in this case. Rather, the question now before me is how financial liability for the accident is to be divided ultimately amongst the lessor and the lessee and their insurers. As the Third Circuit pointed out in *Carolina Casualty Insurance, supra*, § 1057.4 does not prohibit a lessor and lessee from agreeing between themselves to allocate financial risk in a certain manner. A clause appearing in the one-way lease agreement provided that Mustang and Crowder would indemnify Ryder for all losses resulting from the use of the tractor-trailer. I turn now to an analysis of that provision and its effect on the liabilities of the parties in this case.

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[5] The lease provides in relevant part:

> It is understood that the lease equipment under this agreement is in the exclusive possession, control, and use of the authorized carrier Lessee [Ryder] and that the Lessee [Ryder] assumes full responsibility in respect to the equipment it is operating to the public, the shippers, and the INTERSTATE COMMERCE COMMISSION.

III.

Ryder contends, I believe correctly, that it is not liable for the acts and omissions of Henry Crowder because of the indemnity clause contained in the one-way lease. That clause states:

> It is agreed that Lessor [Mustang and Crowder] will carry acceptable Public Liability and Property Damage Insurance. Lessor [Mustang and Crowder] agrees to reimburse and otherwise indemnify Lessee [Ryder] for any and all losses sustained by Lessee [Ryder] resulting from the use of the aforesaid equipment.

Plaintiffs Mustang and Crowder first argue that this provision is not valid because it is violative of 49 C.F.R. § 1057.4. They acknowledge that the United States Supreme Court has upheld one type of indemnity clause in the face of a similar challenge. In *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 41 (1975), the Supreme Court found that an indemnification clause directed to the lessor's negligence does not conflict with the regulations of the ICC. Plaintiffs contend that the indemnity clause found in the one-way lease agreement between Ryder and them is not the type of provision found permissible in *Transamerican Freight Lines, supra*, as it is not directed specifically at the negligence of the lessors. While I would agree that the indemnity clause here is more broad in scope than the one found enforceable in the *Transamerican* decision, I do not believe that fact compels a conclusion that the clause is invalid and not enforceable as to this transaction involving Crowder's negligence. There is nothing in that decision which suggests that a provision like the instant one would be violative of 49 C.F.R. § 1057.4(a)(4). As I noted previously, the purpose of that regulation is to protect members of the public and shippers by placing primary responsibility for the safe operation of a leased vehicle on the motor carrier lessee. The issue now before

me is how the financial liability for the accident ultimately must be allocated, which is a different question.

Mustang and Crowder also argue that the clause is not valid because it is "sweeping" and "all inclusive" and fails to state specifically that the indemnitee, Ryder, will be indemnified for its own negligence and that of one of its employees. I disagree. In *Jones Truck Lines, Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100 (6th Cir. 1974), the Sixth Circuit upheld an indemnity clause identical to the instant one against the same challenge. The Court stated:

> . . . we think it is clear from the indemnity contract that the parties intended that Ryder (indemnitee) should be reimbursed for all losses which it sustained resulting from its use of the equipment and while under its exclusive dominion and control. In unequivocal terms the contract provides that the equipment shall be in the 'exclusive possession, control and use' of the lessee and that the lessee assume full responsibility in respect to the equipment 'to the public.' The lessor, on the other hand, agrees to carry acceptable Liability and Property Damage insurance and, 'to reimburse and otherwise indemnify Lessee for any and all losses sustained by Lessee resulting from the use of the aforesaid equipment.' Clearly this language is susceptible of no meaning other than that the lessor was to indemnify the lessee for all losses sustained by it and resulting from its operation and use of the equipment, whether caused by the lessee's own acts of negligence or otherwise. 507 F.2d at 103.

I share the view of the Sixth Circuit that this clause should be construed as providing indemnity for the lessee even for its own negligence.[6]

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[6] *See also* Carolina Freight Carriers Corp. v. Pitt County Transportation Co., 492 F.2d 243 (4th Cir. 1974); Allstate Insurance Co.

IV.

The next issue to be resolved is whether the insurance policies of either or both Mustang and/or Ryder provide coverage for the accident in Juniata County, Pennsylvania, involving the tractor-trailer driven by Henry Crowder. Plaintiffs claim that Crowder is an insured under the terms of Ryder's insurance policy even if Ryder were found not to be liable for the negligence of Crowder. First, they allege that Crowder was covered under Part II of the Liberty policy, which is entitled "Comprehensive Automobile Liability Insurance." They point to the following portion of the "persons Insured" section of Part II, which states:

> Each of the following is an *insured* under this insurance to the extent set forth below:
>
> (c) Any other person while using an owned automobile or a hired automobile with the permission of the *named insured*, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission . . .

Plaintiffs concede that a separate provision in Part II limits hired automobile coverage to excess insurance and that the policy as it regards hired vehicles is modified by a "truckmen's endorsement," in the Liberty policy labeled "Truckmen-Form A."[7] The purpose of a truckmen's en-

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v. Alterman Transport Lines, Inc., 465 F.2d 710 (5th Cir. 1972). *But cf.* Alford v. Major, 470 F.2d 132 (7th Cir. 1972) (finding a similar indemnity clause violative of ICC regulations).

[7] However, as defendants point out, a subsequent provision in the "persons Insured" section of the Liberty policy would appear to exclude Crowder. Subparagraph (ii) states that "The owner . . . of a hired automobile or the owner of a non-owned automobile, or any agent or employee of any such owner" is not insured under the policy. Plaintiffs cite Wellman v. Liberty Mutual Insurance Co., 496 F.2d 131 (8th Cir. 1974), as support for their claim that Crowder is covered under paragraph (c) in spite of the language found in

dorsement is to place responsibility on the insurer of a lessee of a hired vehicle, *Allstate Insurance Co. v. General Fire and Casualty Co.*, 348 F. Supp. 682, 685 (E.D. Pa. 1972),[8] and the truckmen's endorsement in the Liberty Mutual policy does just that. However, as defendants point out and plaintiffs agree, this truckmen's endorsement contains the following reciprocity requirement:

> (b) Except with respect to the named insured or an employee thereof, but subject otherwise to the 'Persons Insured' provision, the insurance does not cover as any insured person or organization, or any agent or employee thereof, engaged in the business of transporting property by automobile for the named insured or for others under any of the following conditions: . . .
>
> (3) If such person or organization so engaged is insured under an automobile liability in-

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subparagraph (ii). The Wellman case involved a similar policy and the question of whether the policy would cover an owner of a hired automobile. The Wellman court resolved the apparent conflict between the two provisions in favor of coverage. Presented with the same issue, however, several other courts, in cases cited by the defendants, have reached the contrary conclusion. *See, e.g.*, Gilkey v. Andrew Weir Insurance Company, 291 F.2d 132 (9th Cir. 1961). However, I need not resolve this question because, as the parties recognize, coverage in this situation is controlled by the truckmen's endorsement in Ryder's insurance policy. Therefore, it is immaterial whether the inconsistency between paragraph (c) and subparagraph (ii) in that policy is resolved in favor or against coverage.

[8] In *Allstate*, Judge Van Artsdalen noted:

> The purpose of the 'Truckmen's Endorsement' is to place the responsibility on lessee's carrier. The party upon whom the Interstate Commerce Commission regulations impose a direct responsibility to the public is the lessee, and the insurance industry accepted this as a rationale for making lessee's carrier primarily liable. 348 F.Supp at 685.

> surance policy which afford coverage for automobiles hired by such person or organization but which does not insure on a direct primary basis the owners of such automobiles and the agents and employees of such owners while such automobiles are being used exclusively in the business of such person or organization and over a route such person or organization is authorized to serve by federal or public authority; . . .
>
> provided, however, a driver or other persons furnished to the named insured with an automobile hired by the named insured shall be deemed not to be an employee of the named insured.

In substance, this clause states that Liberty will give primary coverage to a vehicle leased by Ryder from another company only if that company's insurer provides primary coverage to vehicles which it leases from another company. Plaintiffs offer several theories for why Crowder is not excluded by this reciprocity clause.[9] First, citing an article by Edward C. German entitled "Hired, Rented and Leased Vehicles—Long Haul Endorsements," they argue a reciprocal coverage clause cannot apply to Crowder as he is not a trucking company but merely a one man, one truck operation. That article asserts that a truckmen's endorsement is aimed at relationships between truckers and if a lessor is not a trucker he will not be bound by the reciprocity requirement in such an endorsement to the lessee's insurance policy. As defendants point out, this argument is fallacious because at the time of the accident Crowder was not acting as a one man truck operation but as a servant of Mustang. Under the terms of the reciprocity clause found in the

[9] The courts have routinely found such reciprocity requirements in truckmen's endorsements to be vaild. *See, e.g.*, Allstate Insurance Co. v. General Fire and Casualty Co., *id.*

Liberty truckmen's endorsement, Mustang, as Crowder's employer, was required to extend primary coverage when it was the lessee.

Plaintiffs next argue that the reciprocity clause in the Liberty policy does not preclude coverage because Mustang's insurance policy does insure, on a primary basis, vehicles leased by Mustang from others. First, they note that the definition of insured contained in the Canal policy includes

> . . . any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either.

Mustang contends that the owner lessor of a vehicle leased by Mustang would fall into the category of a "person legally responsible" for the vehicle's use.

Plaintiffs acknowledge that the Gross Receipts Endorsement to the Canal policy provides:

> 2. It is further understood and agreed with respect to hired equipment that should any other like, valid and collectible insurance issued in the name of the owner or lessor, or in favor of the named assured herein, exist, this policy becomes excess over and above such valid and collectible insurance.

They argue, however, that this endorsement does not render coverage under Canal excess coverage because most insurance policies of lessors contain truckmen's endorsements; therefore, in most circumstances the lessor will not have "like" insurance and the coverage under the Canal policy will not become "excess."

Defendants disagree with this interpretation of the Canal policy. They argue that paragraph (c) in the section of the policy entitled "Exclusions" establishes that

the policy does not extend primary coverage to tractors or trailers leased by Mustang from others.[10] Ryder and Liberty also contend that Mustang has misinterpreted the meaning of the phrase "other like, valid and collectible insurance," found in paragraph (2) of the Gross Receipts Endorsement to the Canal policy. It is the defendants' position that since paragraph (c) of the "Exclusions" section of the Canal policy denies coverage for tractors or trailers leased by Mustang from others, there is no primary Canal coverage to which "other like, valid and collectible insurance" can be compared and the word "like" in that endorsement cannot be defined in relation to whether a particular insurance coverage is excess or primary. Defendants argue, I believe correctly, that "other like, valid and collectible insurance" means any insurance provided by the owner or lessor of a vehicle leased by Mustang covering that hired vehicle. Under this interpretation, paragraph 2 of the Canal "Gross Receipts Endorsement" would, in all circumstances, give only excess coverage for vehicles hired by Mustang. Therefore, since the Canal policy gives only excess coverage, the reciprocity clause in Ryder's policy would preclude coverage for Crowder.

V.

Ryder claims that its status in the underlying suits is yet another reason why it is not liable to the plaintiffs in this case. In the wrongful death action brought by the estate of Edward Renzi, Ryder was a third-party defendant. In addition, in the stipulation entered into by counsel when that case was settled, it was agreed that

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[10] Paragraph (c) of "Exclusions" states:

> This policy does not apply: under Coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company.

the ultimate liability of Ryder was to be determined on the basis of its status as third party defendant. Therefore, Ryder asserts that it cannot be liable directly to the original plaintiffs and can only be liable to the original defendants, Mustang and Dease, by way of contribution. Further, it would be liable for contribution, Ryder argues, only if it were determined that Mustang and Ryder were joint employers of Crowder. I have found that Mustang was sole master or employer of Crowder at the time of the accident. Ryder also argues that it is not liable to Crowder for indemnity as indemnity is given by one who is primarily liable to one who is secondarily liable. Under the stipulation of facts, Crowder is the primary tort-feasor. Plaintiffs have conceded that if I were to find that Mustang was the sole employer of Crowder at the time of the accident, Ryder's assessment that it was not liable for contribution or indemnity would be correct. (p. 7 of plaintiffs' reply brief) For the reasons set forth above, I will enter judgment in favor of all the defendants and against all the plaintiffs.

In addition, plaintiffs have agreed that if I found Mustang liable for the actions of Crowder, the Gross Receipts Endorsement to Mustang's insurance policy would provide coverage for the accident. *Id.* Having found that Mustang was the employer of Crowder and thus vicariously liable for his acts and the parties having agreed that if I found Mustang liable, there would be coverage for the accident under Mustang's insurance policy, on the counterclaim, I will enter judgment in favor of all the defendants and against plaintiffs Mustang, Canal and Crowder.[11]

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[11] Although the counterclaim includes claims against R.L. Dease, there is no evidence of record which would provide a basis of liability against him.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2857

MUSTANG TRANSPORTATION COMPANY and
DEASE, R. L. and CROWDER, HENRY
and CANAL INSURANCE COMPANY

v.

RYDER TRUCK LINES, INC. and
LIBERTY MUTUAL INSURANCE COMPANY

MUSTANG TRANSPORTATION CO., HENRY
CROWDER and CANAL INSURANCE COMPANY,
Appellants

Appeal from the United States District Court
for the Eastern District of Pennsylvania

C. A. No. 77-01620

Argued July 21, 1982

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*,
and TEITELBAUM, *District Judge* *

JUDGMENT ORDER

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* Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

ATTEST:

/s/ Sally Nrvos
SALLY NRVOS
Clerk

Dated: July 29, 1982

REGULATIONS INVOLVED

49 C.F.R. § 1057.4 Augmenting equipment.

Other than equipment exchanged between motor common carriers in interchange service as defined in § 1057.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) Contract requirements. The contract, lease, or other arrangement for the use of such equipment:

* * * *

(4) Exclusive possession and responsibilities. Shall provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of said contract, lease or other arrangement.

* * * *

49 C.F.R. § 1057.12 Written lease requirements.

Except as provided in the exemptions set forth in Subpart C of these regulations, the written lease required under § 1057.11(a) shall contain the following provisions:

* * * *

(d) Exclusive possession and responsibilities. The lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease.

* * * *

Office - Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-727

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MUSTANG TRANSPORTATION COMPANY, HENRY CROWDER, AND CANAL INSURANCE COMPANY,
Petitioners

v.

RYDER TRUCK LINES, INC., AND LIBERTY MUTUAL INSURANCE COMPANY,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November 29, 1982

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

Does the "control and responsibility" requirement of the Interstate Commerce Commission's Equipment Leasing Regulation, 49 C.F.R. §1057.4(a)(4), insulate a lessor from liability for the conduct of the operator of a leased tractor/trailer where, under the terms of the Lease Agreement, the lessor agrees to indemnify the lessee for all losses sustained by the lessee resulting from the use of the leased equipment, and where the lessee's liability to the public and shippers is not an issue?

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Ryder Truck Lines, Inc., and Liberty Mutual Insurance Company[1] respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 29, 1982.

OPINION BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania in *Mustang Transportation Company v. Ryder Truck Lines, Inc.*, is reported at 523 F.Supp 1097 (E.D. Pa. 1981). The District Court entered judgment in favor of the defendants and against the plaintiffs. The decision of the District Court was affirmed, without Opinion, by the United States Court of Appeals for the Third Circuit on July 29, 1982.

JURISDICTION

This Brief in Opposition to the Petition for Writ of Certiorari is being filed within the prescribed thirty (30) day period following October 27, 1982. Jurisdiction of this Court has been invoked by Petitioners under 28 U.S.C. §1254(1) 1976.

REGULATION INVOLVED

The Interstate Commerce Commission (ICC) Regulation at issue, 49 C.F.R. §1057.4(a)(4), has been revised and codified in 49 C.F.R. §1057.12(d). Both have been reproduced in the Appendix to the Petition for Writ of Certiorari (App. 22a).

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1. Neither of the corporate respondents is related to a company whose listing is required by Rule 28.1 of the Rules of the Supreme Court of the United States.

COUNTERSTATEMENT OF THE CASE

This suit was brought to resolve questions of liability and insurance coverage arising out of an accident involving a tractor/trailer and an automobile which occurred on December 7, 1969, in Juniata County, Pennsylvania. The tractor/trailer was operated by Henry Crowder ("Crowder"). Crowder owned the tractor; Mustang Transportation Company ("Mustang") owned the trailer. The automobile with which the tractor/trailer collided was owned and operated by Charles A. Benedict ("Benedict"). Daniel Mattia ("Mattia") and Edward A. Renzi ("Renzi") were riding in the automobile as passengers. Renzi was killed; Benedict and Mattia were injured. At the time of the accident the tractor/trailer was being operated under a One-Way Lease Agreement between Crowder and Mustang, as lessors, and Ryder Truck Lines, Inc. ("Ryder"), as lessee.

Separate actions were started in the United States District Court for the Eastern District of Pennsylvania to recover damages sustained in the accident. Marie Renzi, Administratrix of the Estate of Edward A. Renzi, deceased, brought suit against R.L. Dease ("Dease"), Vice President and Secretary of Mustang, Crowder and Mustang. Ryder was joined as a third party defendant in that suit. Benedict and Mattia brought a separate suit against Crowder and Dease to which Ryder was not a party. The two cases were consolidated for trial before the Honorable Clifford Scott Green and were then settled for $117,500.00. Canal Insurance Company ("Canal"), Mustang's insurer, and Liberty Mutual Insurance Company ("Liberty Mutual"), the insurer of Ryder, each agreed to contribute one-half of the settlement fund and to litigate in a separate proceeding questions relating to insurance coverage and liability of the lessors and lessee.

The within action was brought by Mustang, Dease, Crowder and Canal against Ryder and Liberty Mutual, claiming that Ryder and Liberty Mutual owed the entire

settlement proceeds. Ryder and Liberty Mutual filed a Counterclaim in which they set forth their position that Mustang, Dease, Crowder and Canal owed the entire proceeds of settlement. The jurisdiction of the District Court was based upon diversity of citizenship of the parties. 28 U.S.C. §1332(a)(1)(1976).

For purposes of determining the issues of liability and insurance coverage the parties stipulated that Crowder's acts or omissions were the proximate cause of the injuries and damages allegedly sustained by the plaintiffs in the underlying suits. The stipulation also provided as follows:

The One-Way Lease Agreement was executed on December 6, 1969, by Crowder, on his behalf and on behalf of Mustang as lessors, and by Ryder, as lessee. At that time, Crowder's tractor was under a long term indefinite lease to Mustang for approximately 75-80% of his work. The lease to Ryder covered a single trip to Michigan and was entered into by Crowder, on behalf of Mustang, as was Mustang's practice, so as to avoid returning to Mustang's place of business, Atlanta, Georgia, with an empty trailer.

The Lease contained an indemnity provision in which Crowder and Mustang, lessors, agreed to indemnify Ryder, lessee, for all losses sustained by Ryder resulting from the use of the tractor/trailer. That clause reads as follows:

> It is agreed that Lessor [Mustang and Crowder] will carry acceptable Public Liability and Property Damage Insurance. Lessor [Mustang and Crowder] agrees to reimburse and otherwise indemnify Lessee [Ryder] for any and all losses sustained by Lessee [Ryder] resulting from the use of the aforesaid equipment. (Brackets added.)

By order dated September 28, 1981, the Honorable Clifford Scott Green, sitting without a jury, granted judgment in favor of the defendants, Ryder and Liberty

Mutual, on the claims of Mustang, Dease, Crowder and Canal. Liberty Mutual and Ryder were also awarded $58,750.00, the amount claimed on their Counterclaim against Mustang, Crowder and Canal.

The findings of the Lower Court may be summarized as follows:

First, the Court held that Crowder was Mustang's agent at the time of the accident, whereas the relationship of Ryder and Crowder was that of principal and independent contractor. 523 F.Supp. 1102, Appendix to the Petition, 4a-11a.

Second, the Court found that the indemnity agreement in the One Way Lease Agreement, in which Crowder and Mustang, lessors, agreed to indemnify Ryder, lessee, for all losses sustained by Ryder resulting from the use of the tractor/trailer, was valid and enforceable in accordance with this Court's ruling in *TransAmerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975). *Id.* 1104, Appendix, 12a-13a.

Third, the District Court held that the "Truckmen's Endorsement" in the Liberty Mutual policy, extending coverage to a leased vehicle in certain situations, did not apply in the within case because Canal's policy did not contain reciprocal coverage for the vehicles Mustang leased from other trucking companies. *Id.* 1106-07, Appendix, 14a-18a.

Fourth, because the District Court found that Mustang was the sole employer of Crowder at the time of the accident, and in view of the stipulation that Crowder was the primary tortfeasor, the District Court held that Ryder was not liable for contribution or indemnity. The plaintiffs, Mustang, Dease, Crowder and Canal, conceded that, if Crowder were the sole employee of Mustang, Ryder would not be liable for contribution or indemnity. *Id.* 1107, Appendix 18a-19a.

Lastly, because the District Court found that Mustang was the sole employer of Crowder, the District

Court found that the Gross Receipts Endorsement in Mustang's insurance policy provided coverage for the accident, including the Counterclaim of Ryder and Liberty Mutual. *Id.* 1107, *Appendix*, 19a.

Mustang, Crowder and Canal sought review of the District Court's Opinion in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291 (1976). On July 29, 1982, the Third Circuit entered an Order affirming, without Opinion, the District Court's judgment.

REASONS FOR DENYING A WRIT OF CERTIORARI

It is the position of the respondents that this case is not one which requires the exercise of this Court's extraordinary and discretionary jurisdiction. The decision of the District Court, as affirmed by the United States Court of Appeals for the Third Circuit, was correct and in accordance with this Court's recent decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975).

Petitioners argue that certiorari should be granted because the case involves a significant federal question, the interpretation of an Interstate Commerce Commission Regulation, 49 C.F.R. §1057.4(a)(4), and conflicts with the decisions of Courts of Appeals for the Fifth and Seventh Circuits and the Supreme Courts of Georgia, Illinois and Maine. That position is incorrect and completely disregards the real issues in this case.

The District Court, as affirmed by the Third Circuit, beginning at page 11a of the Appendix to the Petition, correctly held that 49 C.F.R. §1057.4(a)(4) is totally inapplicable to the present case because the liability of Ryder, the lessee, to members of the public and to shippers who were damaged by Crowder's negligence, was not an issue in the case. Rather, as Judge Green said, the question before the Court was how financial liability for the accident was to be divided ultimately among the lessors and the lessee and their insurers who are not protected by the ICC regulations.

The ICC regulations require that Ryder, as lessee, assume exclusive possession, control and use of the tractor/trailer as well as full responsibility for its operation. The lease with Ryder complied in all respects with such regulations. The pertinent part of the Lease provided as follows:

> It is understood that the lease equipment under this agreement is in the exclusive possession, control,

> and use of the authorized carrier Lessee [Ryder] and that the Lessee [Ryder] assumes full responsibility in respect to the equipment it is operating to the public, the shippers, and the Interstate Commerce Commission. (Brackets added.)

The District Court correctly held that the ICC regulations do not prohibit a lessor and a lessee from agreeing between themselves to allocate financial risk in a certain manner and that is what was done in this case in the One-Way Lease Agreement. Under the terms of the Lease, Mustang and Crowder, lessors, were required to indemnify Ryder, lessee, for all losses resulting from the use of the leased equipment. In upholding the indemnity agreement the District Court relied upon this Court's recent decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., supra,* in which this Court held that the ICC regulations do not prohibit an indemnification provision in a lease agreement between the lessor and the lessee, where, as in this case, the lessee does not absolve itself from the duty to the public and to shippers imposed upon it by the Commission's regulations. 423 U.S. at 39-41. The following language, at 41, is particularly pertinent:

> *An indemnification provision with respect to the lessor's negligence does not necessarily tend to lessen operational safety. On the contrary, it may increase it.* The lessor, as a general rule, is the party more familiar with the equipment it leases and with the experience, ability and record of the driver it furnishes. Any agreement placing the ultimate financial responsibility upon the negligent lessor thus may have a tendency to provide greater protection to the public and to shippers. (Emphasis added.)

Moreover, at least four Courts of Appeals, including the Third Circuit, have held that indemnification clauses in one-way lease agreements, similar to the one involved in the within matter are valid and do not violate

the ICC regulations. *Carolina Casualty Insurance Company v. Insurance Company of North America*, 595 F.2d 128, 130 (3rd Cir. 1979); *Carolina Casualty Insurance Company v. Underwriters Insurance Company*, 569 F.2d 304, 313 (5th Cir. 1978); *Jones Truck Lines Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100, 102 (6th Cir. 1974); *Carolina Freight Carriers Corp. v. Ritt County Transportation Co.*, 492 F.2d 243, 246 (4th Cir. 1974); *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F.2d 710, 713 (5th Cir. 1972); *Vance Trucking Co. v. Canal Insurance Co.*, 249 F.Supp. 33, 39, *aff'd* 395 F.2d 391 (4th Cir.), *cert. denied* 393 U.S. 845 (1968); *Allstate Insurance Company v. Liberty Mutual Insurance Co.*, 368 F.2d 121, 125 (3rd Cir. 1966).

Only one Court of Appeals, in a case upon which petitioners rely, found such indemnity provisions to be contrary to public policy. *See Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). That case was overruled by *Transamerican Freight Lines, Inc.* in which this Court reversed a decision of the Court of Appeals for the Seventh Circuit that had followed *Alford v. Major*. 423 U.S. at 33-34. Therefore, the decision of the District Court in the instant case, cannot be considered in conflict with the Court of Appeals for the Seventh Circuit.

The main argument of the petitioners beginning at page 6 of the Petition is that, until the Opinion of the District Court in this case, Lower Courts have held a vehicle lessee liable to the public and to shippers as a matter of law under 49 C.F.R. §1057.4(a)(4), and that Judge Green's opinion was to the contrary. *See Simmons v. King*, 478 F.2d 857 (5th Cir. 1973); *Cosmopolitan Mutual Insurance Company v. White*, 336 F.Supp. 92 (D. Del. 1972); *Farmer v. Ryder Truck Lines, Inc.*, 245 Ga. 734, 266 S.E.2d 922, *cert. denied*, 449 U.S. 885 (1980); *Schedler v. Rowley Interstate Transportation Co.*, 68 Ill.2d 7, 368 N.E.2d 1287 (1977); *Weeks v. Kelley*, 377 A.2d 444 (Me. 1977). That simply is not what the District Court decided in this case because that issue was

not before the court. Moreover, none of those cases dealt with tractor/trailer leases with indemnity provisions; they dealt only with the requirement of the ICC Regulation, §1057.4(a)(4) that the lessee assume "full responsibility . . . to the public".

As stated in the District Court Opinion beginning at page 18a of the Appendix, the stipulation of the parties under which the within case was tried provided that the ultimate liability of Ryder was to be determined on the basis of the pleadings in the underlying actions, that is, that Ryder was not named as a party in one of the underlying actions and was only a third-party defendant in the other. Therefore, because plaintiffs in the underlying actions never had a direct claim against Ryder, the District Court never considered the question whether Ryder should be found liable to the public as a matter of law and, instead, concluded that it was concerned only about how financial liability for the accident was to be divided among the lessors and the lessee and their insurers under the terms of the Lease Agreement and the pertinent facts.

The District Court correctly pointed out in its Opinion at page 19a of the Appendix that, because Ryder was not named as a direct defendant in the underlying cases, it could only be liable to the original defendants, Mustang and Crowder, for contribution in the Renzi case in which it was named a third-party defendant. Further, Ryder could be found liable for contribution only if it were determined that Mustang and Ryder were joint employers of Crowder, again because Ryder was not named a direct defendant. On that issue, the District Court held, applying state law, that under the terms of the lease between Mustang and Crowder, Mustang exercised such control over Crowder that it, Mustang, was Crowder's sole master or employer at the time of the accident. That part of the District Court Opinion involved only an interpretation of the lease between Mustang and

Crowder, and in no way can be said to impact on the question of Ryder's liability to the public.

The cases cited by petitioners, among them *Cosmopolitan Mutual Insurance Company v. White*, are not to the contrary. Although such cases stated that an ICC carrier's liability for equipment and driver is not governed by traditional common law doctrines of master-servant relationships and respondeat superior, those cases involved the public or shippers and were not concerned with the issue in this case — how financial liability for the accident was to be divided ultimately among the lessors and the lessee and their insurers.

Petitioners state at page 9 of the Petition that once the District Court determined that the vehicle operator was not an insured individual under the terms of either policy, it had to decide the question of the trucker's ultimate responsibility to the public. That statement is incorrect. First of all, the Court decided that the policy of Liberty Mutual, the lessee's insurer, provided no coverage because of the absence of reciprocity. Appendix to the Petition, 14a-18a. Secondly, the Court did not determine that there was no coverage under the policy of Canal, the lessor's insurer, for Crowder — it never reached that issue. The District Court simply stated petitioners conceded that if the Court were to find Mustang, the lessor, was the sole employee of Crowder at the time of the accident, there would be coverage for the accident under Mustang's insurance policy. Appendix to the Petition, 19a.

It is also significant that nothing in any of the cases cited by the petitioners suggests that the ICC regulations automatically protect the lessor from liability under state law concepts of vicarious liability or contractual liability under an indemnification agreement in a lease. In fact, *Simmons v. King*, the Fifth Circuit case upon which petitioners place great reliance, concluded that:

> [A]lthough [the lessee] is liable for [the driver's] acts as a matter of law, [the lessor] could still be like-

> wise liable under applicable common [law] . . . standards . . . . This is not as incongruous as might be supposed. ICC can mandate a positive legal responsibility which we uphold in the only way it would be meaningful — to give protection to the injured member of the public. *At the same time [the lessor] has, or may have, a practical control over [the driver] of a kind which would not allow it to obtain an automatic insulation from liability from the mere terms of a lease between two parties.* (Emphasis added and brackets added.)

478 F.2d at 867. The case was remanded to the District Court for a new trial on that issue.

In *Weeks v. Kelley*, another case cited by petitioners, the Supreme Court of Maine recognized that this Court, in *Transamerican Freight Lines, Inc.*, upheld an indemnification agreement in a tractor/trailer lease and then noted that *only "in the absence of any indemnification agreement in the lease providing otherwise*, the lessee remains contractually (as well as statutorily) responsible for injuries sustained by the travelling public as a result of the negligent operation of the equipment." (Emphasis added.) 377 A.2d 444, 447. Likewise, because of the indemnity agreement in the present case, as between lessor and lessee, the regulations providing for "full responsibility" in the lessee are inapplicable.

It follows therefore that the decision of the District Court, as affirmed by the United States Court of Appeals for the Third Circuit, was entirely correct and in accordance with this Court's decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.* and does not conflict with any other decisions. Of equal importance, the decision does not in any way upset the regulatory scheme embodied in the ICC regulations because this case did not, in any way, involve a lessee's liability to members of the public or to shippers. The sole and only proposition for which the present case stands is

that the ICC regulations do not prohibit a lessor and a lessee from agreeing between themselves to allocate financial risk by way of an indemnity provision in a lease agreement.

CONCLUSION

For all above reasons, the Petition for Writ of Certiorari should not be granted.

RESPECTFULLY SUBMITTED,

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